Maril-Rionebel (M) Sdn Bhd & Anor v Perdana Merchant Bankers Bhd and other appeals

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEALS NO W–02–808 OF 2000, W–02–809 OF 2000, W–02–784 OF 2000, W–02–783 OF 2000 AND W–02–481 OF 1999

GOPAL SRI RAM, ABDUL HAMID MOHAMAD JJCA AND MOHD NOOR J
5 APRIL 2001

Companies and Corporations *— Winding up — Opposition to petition — More than one petition presented, whether valid — Affidavit predated petition — Whether presentation of second petition offended s 224 Companies Act 1965 — No bona fide dispute on petition — Procedural defects in application to amend petition, whether thwarted interests of justice — Whether application to cross examine was an attempt to stall proceedings and an abuse of process*

An order of winding up had been made against the appellant company. The appellant had filed several appeals: (i) appeal against the winding up order. It was submitted that there was at the date on which the respondent presented its petition, already in existence another petition presented much earlier by another creditor. It was also submitted that the respondent's petition came within s 224 of the Companies Act 1965 ('the Act'); (ii) appeal against the order by the judge declining to stay the winding up petition on the ground that there were two suits in which the appellant sought to impeach the judgment and an order for sale that had been obtained against the appellant; (iii) appeal against the decision of the judge granting an amendment to the respondent's petition; (iv) appeal against the judge's refusal to strike out the petition; and (v) appeal against the judge's refusal to order cross examination of the deponent of the respondent's affidavit.

Held, dismissing the appeal:

(1) (per **Gopal Sri Ram JCA**) More than one winding up petition may be presented against a company. The respondent's petition was not bad in law. Nor was it an abuse of the court's process (see pp 197I–198A); *Ladli Parshad Jaiswal v Karnal Distillery Co Ltd* (1954) 24 Comp Cas 77 followed. The fact that the affidavit predated the petition by hours or even days did no injustice to anyone (see p 202D).

(2) (per **Gopal Sri Ram JCA**) A petition for winding up is not execution. For a winding up petition is not based upon any judgment of a court. Normally it is based on the inability of a company to pay its debts as and when they fall due. Such an inability is normally evidenced by the company's inability to satisfy or compound a notice of demand issued pursuant to s 218 of the Act. But the issuance of such a notice is not a sine qua non for the presentation of a winding up petition. What is needed is compelling evidence of the company's inability to pay its debts as and when they fall due. There was therefore no merit at all in

the suggestion by the appellant that the presentation of the second petition by the respondent offends s 224 of the Act (see pp 198C–E, 199D).

(3) (per **Gopal Sri Ram JCA**) The judgment sought to be impeached was obtained on a hotly contested summons for judgment. It was unsuccessfully appealed to the Supreme Court. Despite all this, the first suit was filed in 1992 and the second in 1997. The application to stay the petition was taken out in April 2000, after the High Court had fixed the petition for hearing in the presence of all counsel. In these circumstances, the court found that there was no bona fide dispute based on substantial grounds. The appellant had a history of questioning judgments after they were entered on summonses that were seriously contested. What the appellant was seeking to do was an abuse of process of court (see p 200D–E).

(4) (per **Gopal Sri Ram JCA**) The power to amend is discretionary. It is to be exercised liberally in the interests of justice so that the real issues may be placed before the court. An appellate court does not interfere in such cases unless there is a misdirection. Having reviewed the material, the court was satisfied that any reasonable tribunal similarly circumstanced would have come to the same conclusion and granted the amendment. The fact that the amended petition was not annexed to the affidavit of truth was not fatal. The interests of justice were not thwarted by such procedural departures (see p 202D–F).

(5) (per **Gopal Sri Ram JCA**) The subject matter on which the cross examination was to be directed had to do with the correctness of the summary judgment entered against the appellant and tested at the appellate level. The application to cross examine was therefore clearly an abuse of the court's process. What was being proposed was a re-opening of a cause that had been disposed of to finality. Further, the decision whether or not to order cross examination was within the discretion of the primary judge. On the available material, any reasonable tribunal similarly circumstanced would have arrived at the same decision (see pp 202H–203A).

(6) (per **Abdul Hamid Mohammad JCA)** It is timely that the court come out strongly against the unhealthy trend in the way winding up petitions are often conducted. Instead of defending the petition proper at the hearing of the petition, the respondent makes all kinds of interlocutory applications that would invariably stall the hearing of the petition proper. Such practice is unfair to the petitioners and clogging the court docket (see pp 203F–G, 205D–E).

Obiter:

(1) (per **Gopal Sri Ram JCA**) A company which has been ordered to be wound up has the right to appeal against such an order and

to make any and all applications within the appeal, including an application for a stay of the winding up order. Any decision to the contrary is wrong and should not be followed (see p 194F–G); *Miliangos v George Frank (Textiles) Ltd* [1975] 1 All ER 1076 followed.

(2) (per **Gopal Sri Ram JCA**) A litigant who has a number of procedural and substantive grounds in opposition to any cause or matter must take all of them in one go. He cannot present his case in instalments. He cannot take one procedural point at a time and invite a separate ruling from the presiding judge (see p 195E–F).

[Bahasa Malaysia summary

Satu perintah penggulungan telah dibuat terhadap syarikat perayu. Perayu telah memfailkan beberapa rayuan: (i) rayuan terhadap perintah penggulungan. Adalah dihujahkan bahawa pada tarikh responden mengemukakan petisyennya, telah wujud satu petisyen lain yang terdahulu oleh pemiutang yang lain. Adalah juga dihujahkan bahawa petisyen responden terlingkung dalam s 224 Akta Syarikat 1965 ('Akta tersebut'); (ii) rayuan terhadap perintah oleh hakim keran enggan untuk menggantungkan petisyen penggulungan atas alasan bahawa terdapat dua guaman di mana perayu telah memohon untuk mencabar penghakiman dan perintah jualan yang telah diperolehi terhadap perayu; (iii) rayuan terhadap keputusan hakim yang membenarkan pindaan kepada petisyen responden; (iv) rayuan terhadap keengganan hakim untuk membatalkan petisyen tersebut; dan (v) rayuan terhadap keengganan hakim untuk memerintahkan pemeriksaan balas deponen kepada afidavit responden.

Diputuskan, menolak rayuan tersebut:

(1) (oleh **Gopal Sri Ram HMR**) Lebih daripada satu petisyen penggulungan boleh dikemukakan oleh sebuah syarikat. Petisyen responden bukanlah tidak baik dari segi undang-undang. Mapupun ia satu penyalahgunaan proses mahkamah (lihat ms 197I–198A); *Ladli Parshad Jaiswal v Karnal Distillery Co Ltd* (1954) 24 Comp Cas 77 diikut. Hakikat bahawa afidavit tersebut telah wujud sebelum petisyen tersebut berjam-jam ataupun berhari-hari tidaklah berlakunya ketidakadilan kepada sesiapa (lihat ms 202D).

(2) (oleh **Gopal Sri Ram HMR**) Satu petisyen penggulungan bukan merupakan satu pelaksanaan. Ini adalah kerana satu petisyen penggulungan tidak berasaskan apa-apa penghakiman mahkamah. Biasanya ia berasaskan ketidakupayaan syarikat untuk membayar hutang-hutangnya apabila tiba masa untuk membayar hutang-hutang tersebut. Ketidakupayaan demikian biasanya menerangkan ketidakupayaan syarikat untuk memenuhi

atau mengkompaunkan satu notis tuntutan yang dikeluarkan menurut s 218 Akta tersebut. Tetapi pengeluaran satu notis sedemikian bukan satu sine qua non untuk presentasi satu petisyen penggulungan. Apa yang diperlukan adalah keterangan yang mendorong tentang ketidakupayaan syarikat untuk membayar hutang-hutangnya apabila tiba masa untuk membayar hutang-hutang tersebut. Oleh itu tiada merit langsung dalam cadangan responden bahawa presentasi petisyen kedua oleh responden melanggar s 224 Akta tersebut (lihat ms 198C–E, 199D).

(3) (oleh **Gopal Sri Ram HMR**) Penghakiman yang dipohon untuk dicabar telah diperolehi berdasarkan satu saman penghakiman yang hangat dipertikaikan. Ia telah gagal dirayukan ke Mahkamah Agong. Meskipun semua ini, guaman pertama telah difailkan pada tahun 1992 dan yang kedua pada tahun 1997. Permohonan untuk menggantungkan petisyen tersebut telah dibuat dalam bulan April 2000, setelah Mahkamah Tinggi menetapkan petisyen untuk perbicaraan dengan kehadiran semua peguam. Dalam keadaan demikian, mahkamah mendapati bahawa tiada pertikaian bona fide berdasarkan alasan-alasan penting. Perayu mempunyai sejarah mempertikaikan penghakiman setelah saman-saman disempurnakan atas pertikaian yang serius. Apa yang perayu pohon untuk lakukan adalah satu penyalahgunaan proses mahkamah (lihat ms 200D–E).

(4) (oleh **Gopal Sri Ram HMR**) Kuasa untuk membuat pindaan adalah berdasarkan budi bicara. Ia harus digunakan dengan liberal untuk kepentingan keadilan agar persoalan-persoalan sebenar boleh dihadapkan ke mahkamah. Mahkamah rayuan tidak campur tangan dalam kes-kes sedemikian kecuali terdapat salah arahan. Setelah mengkaji semula bahan tersebut, mahkamah berpuas hati bahawa mana-mana tribunal yang munasabah yang berada dalam keadaan yang sama akan tiba kepada keputusan yang sama dan membenarkan pindaan tersebut. Hakikat bahawa petisyen yang dipinda itu tidak dilampirkan kepada afidavit sebenar tidak memudaratkan. Kepentingan keadilan tidak dihalang oleh penyimpangan prosedur tersebut (lihat ms 202D–F).

(5) (oleh **Gopal Sri Ram HMR**) Perkara pokok di mana pemeriksaan balas diarahkan adalah berhubung pembetulan penghakiman terus yang dimasuki antara perayu dan diuji di peringkat rayuan. Permohonan untuk pemeriksaan balas tersebut oleh itu dengan jelas satu penyalahgunaan proses mahkamah. Apa yang dicadangkan adalah satu pembukaan semula satu kausa yang telah diselesaikan sehingga muktamad. Tambahan pula, keputusan sama ada atau tidak untuk memerintahkan pemeriksaan balas adalah budi bicara hakim utama. Berdasarkan bahan yang sedia ada, mana-maan tribunal yang munasabah yang berada dalam keadaan yang sama akan tiba kepada keputusan yang sama (lihat ms 202H–203A).

(6) (oleh **Abdul Hamid Mohammad HMR**) Telah tiba masanya mahkamah lebih tegas terhadap budaya yang tidak sihat di mana petisyen penggulungan selalunya dikendalikan. Daripada membela petisyen yang betul di perbicaraan petisyen tersebut, responden telah membuat bermacam-macam permohonan intelokutori yang selalunya akan melengah-lengahkan perbiacaraan petisyen yang betul. Amalan sedemikian tidak adil kepada pempetisyen-pempetisyen dan menghambat kelancaran doket mahkamah (lihat ms 203F–G, 205D–E).

Obiter:

(1) (oleh **Gopal Sri Ram HMR**) Sebuah syarikat yang telah diarahkan untuk digulungkan mempunyai hak untuk membuat rayuan terhadap perintah sedemikian dan untuk membuat mana-mana dan semua permohonan dalam rayuan tersebut, termasuklah satu permohonan untuk satu perintah penggantungan. Apa-apa keputusan yang bertentangan adalah salah dan tidak patut diikut (lihat ms 194F–G); *Miliangos v George Frank (Textiles) Ltd* [1975] 1 All ER 1076 diikut.

(2) (oleh **Gopal Sri Ram HMR**) Seorang litigan yang mempunyai beberapa alasan prosedur dan substantif yang bertentangan dengan mana-mana kausa atau perkara mesti mengambil semuanya sekaligus. Beliau tidak boleh mengemukakan kes beliau secara berperingkat. Beliau tidak boleh mengambil perkara prosedur satu persatu dan memohon keputusan yang berasingan daripada hakim perbicaraan (lihat ms 195E–F).]

Notes

For cases on opposition to petition, see 3(1) *Mallal's Digest* (2000 Reissue) paras 973–995.

Cases referred to

Antara Elektrik Sdn Bhd v Bell & Order Bhd [2000] 6 MLJ 385 (refd)

Asia Commercial Finance (M) Bhd v Lum Choon Realty Sdn Bhd Penang High Court Winding Up No 28–60–92 (refd)

Buildcon-Cimaco Concrete Sdn Bhd v Filotek Trading Sdn Bhd [1999] 4 CLJ 135 (refd)

Hendry v George John De Cruz [1949] MLJ Supp 25 (refd)

Hunter v Chief Constable of West Midlands & Anor [1981] 3 All ER 727 (refd)

Kredin Sdn Bhd, Re (Companies Winding Up No 28–55–89) (refd)

Ladli Parshad Jaiswal v Karnal Distillery Co Ltd (1954) 24 Comp Cas 77 (folld)

Lai Yoke Ngan & Anor v Chin Teck Kwee & Anor [1997] 2 MLJ 565 (refd)

Miliangos v George Frank (Textiles) Ltd [1975] 1 All ER 1076 (refd)
Morgan Guaranty Trust Co of New York v Lian Seng Properties Sdn Bhd [1991] 1 MLJ 95 (refd)
Nicholls v Nicholls (1997) 147 NLJ 61 (refd)
Norton Iron Co, Re (1877) 47 LJ Ch 9 (refd)
Overseas Aviation Engineering (GB) Ltd, Re [1962] 3 All ER 12 (refd)
Raja Zainal Abidin bin Raja Haji Tachik & Ors v British-American Life & General Insurance Bhd [1993] 3 MLJ 16 (refd)
SP Setia Bhd v Gasing Heights Sdn Bhd [2001] 5 MLJ 117 (refd)
Sri Hartamas Development Sdn Bhd v MBF Finance Bhd [1991] 3 MLJ 325 (refd)
Stonegate Securities Ltd v Gregory [1980] 1 All ER 241 (refd)
Sun Microsystems (M) Sdn Bhd v KS Eminent Systems Sdn Bhd [2000] 4 MLJ 565 (refd)
Taylors Industrial Flooring Ltd v M&H Plant Hire (Manchester) Ltd [1990] BCLC 216 (refd)
Teck Yow Bros Hand-Bag Trading Co v Maharani Supermarket Sdn Bhd [1989] 1 MLJ 101 (refd)
Young v Bristol Aeroplane Co Ltd [1944] 1 KB 718 (folld)

Legislation referred to

Companies Act 1965 ss 4, 218, 219(2), 224, 253(2)
Companies (Winding Up) Rules 1972 rr 32, 33
Courts of Judicature Act 1964 ss 43, 44(1), 67(1)
Rules of the High Court 1980 O 18 r 19

Cecil Abraham (*T Gunaseelan* with him) (*Jayaraman Ong & Co*) for the appellant.

Lambert Rasa-Ratnam (*Sean Yeow* with him) (*Lee Hishamuddin*) for the respondent.

Gopal Sri Ram JCA:

Preliminary

There are several appeals that are being disposed of by this judgment. They all arise out of the same dispute. It has to do with an order of winding up made against the appellant company. A few words first about how we came to hear these appeals.

On Monday, 2 April 2001, a company called Anafartalar Caddesi Sdn Bhd moved us on an application for stay of execution of a winding up order made against the appellant. It is a contributory of the appellant. After a short argument, we permitted the applicant company to be added as a co-appellant, and directed the cause papers before us to be amended to reflect this. We also granted a stay of execution pending appeal. Since the matter was of some importance to the parties, it was, by consent, ordered that the motion for stay be treated as the appeal proper. Leave was then given to the appellants to formally lodge and serve its memorandum of appeal by 11am the following day sans any supporting documents. The parties before us,

A including the supporting creditors, were given liberty to put in one affidavit to complete the record if necessary. We then fixed the appeal for hearing on 5 April 2001.

Standing to apply for a stay

B As I said earlier, the applicant is a contributory of the appellant. It had taken no part in the proceedings in the court below. Yet it was moving us for a stay. Now, that sounded to me to be a bit odd. I would have thought that the proper party to make such an application was the appellant itself. I said so during argument. We were then told that the appellant had indeed made a similar application earlier. But it had withdrawn it on the strength of a C decision by another division of this court. That decision was to the effect that it was not competent for a company that had been wound up to make an application to stay execution of the winding up order.

I must be forgiven if I express my strong dissent against any such view. Both principle and the weight of authority are against it. So far as principle D is concerned, one need only refer to the relevant statutory provisions.

First, there is s 253(2) of the Companies Act 1965 ('the Act'). It reads as follows:

> Subject to the rules an appeal from any order or decision made or given in the winding up of a company shall lie in the same manner and subject to the same E conditions as an appeal from any order or decision of the court in cases within its ordinary jurisdiction.

For completeness, I would mention that the expression 'court' is defined by s 4 of the Act as meaning the High Court or a judge thereof.

Next, there is s 67(1) of the Courts of Judicature Act 1964 ('the CJA') F which provides as follows:

> The Court of Appeal shall have jurisdiction to hear and determine appeals from any judgment or order of any High Court in any civil cause or matter, whether made in the exercise of its original or of its appellate jurisdiction, subject nevertheless to this or any other written law regulating the terms and conditions upon which such appeals shall be brought.

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Lastly, there is s 44(1) of the CJA which provides as follows:

> (1) In any proceeding pending before the Court of Appeal any direction incidental thereto not involving the decision of the proceeding, any interim order to prevent prejudice to the claims of parties pending the hearing of the proceeding, any order for security for costs, and for the H dismissal of a proceeding for default in furnishing security so ordered may at any time be made by a Judge of the Court of Appeal.'

Applying these sections to a case as the present, the following conclusions result. First, that a company that has been ordered to be wound up has a right to appeal against that order. Second, after lodging its notice of appeal, I the company is entitled to apply to the Court of Appeal for a stay of the winding up order in the ordinary way. In other words, incorporated into the right to appeal against a winding up order is the further right to apply for all

ancillary relief that is open to an appellant taking advantage of the system. Of course, before applying to us, it is necessary for an appellant to move the High Court first (s 43 of the CJA).

So far as authority is concerned, one need look no further than the judgment of that very learned judge, Hashim Yeop A Sani CJ (Malaya) in *Sri Hartamas Development Sdn Bhd v MBF Finance Bhd* [1991] 3 MLJ 325. After a discussion of the cases that hold that a board of directors exercise residuary powers to instruct solicitors to lodge an appeal despite the making of a winding up order, the learned Chief Justice of Malaya said:

> After a winding-up order is made, generally speaking no one but the liquidator can act on behalf of the company. But it is quite clear that the company has a right to be heard to say that the winding-up order is wrong and to appeal against the order. In our case it is expressly provided in s 253(2) of the Act. The only question is who should move the appeal on behalf of the company.
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> An earlier decision of this court in *Rajannan s/o Ravaniah & Ors v Sivalingam s/o Arumugam Karuppiah* (Civil Appeal No 02-41-1990) (unreported) is to be distinguished. There the notice of motion for stay and the supporting affidavits were filed by the directors and shareholders of Tamil Osai Sdn Bhd, the company, and they together with the company filed a motion for stay of the winding-up order pending appeal. The application for stay was allowed by this court although the appeal itself was subsequently dismissed.

I am most conscious of the doctrine of precedent that binds us. Generally speaking, a decision of one division of this court is binding on another. See *Hendry v George John De Cruz* [1949] MLJ Supp 25. But this is not an absolute rule. Otherwise, we will be affirming decisions that occasion injustice and are plainly wrong under the artificial umbrella of the doctrine of precedent. In departing from our previous decisions, we act on the third exception laid down by Lord Greene MR in *Young v Bristol Aeroplane Co Ltd* [1944] 1 KB 718, namely, that the previous decision was given *per incuriam*. See also *Miliangos v George Frank (Textiles) Ltd* [1975] 1 All ER 1076, at p 1084:

> To conclude this point, it is in my judgment beyond argument that a company which has been ordered to be wound up has the right to appeal against such an order and to make any and all applications within the appeal, including an application for a stay of the winding up order. Any decision to the contrary is wrong and should not be followed.

In the present case, strong objection was taken by counsel for the respondent as to the maintainability of the application by the applicant company. It was said that the applicant had no standing to make the application because it was not a party to the proceedings. I do not propose to deal with any of the arguments advanced in opposition to the stay. They fell by the wayside once we directed that the applicant be added as a party to the appeal. But I will say this. If we had taken a purely legalistic approach to this part of the case on the invitation of counsel for the respondent, great injustice would have befallen the appellant. It would have meant that acting upon a wrong precedent of this court, the appellant would have no right to

apply for a stay and neither would any contributory. We cannot stand by idly and watch such an injustice pass us by. We must act. And we did.

The appeals

I now turn to address the principal arguments addressed on the several appeals before us. I will summarize these. There is the main appeal against the order winding up the appellant. Next, there is the appeal against the order by the judge declining to stay the winding up petition on the ground that there were two suits in which the appellant sought to impeach the judgment and order for sale that had been obtained against the appellant. There is also an appeal against the decision of the judge granting an amendment to the respondent's petition. The fourth appeal is against the judge's refusal to strike out the petition. Lastly, there is the appeal against the judge's refusal to order cross examination of the deponent of the respondent's affidavits. Before I deal with the arguments raised on each of these appeals, there is something that needs be said by way of a general observation, as well as in particular about the conduct of the appellant's case in the court below.

There is a trend — and it is an unhealthy trend — for practitioners to raise several points either on several different applications, or by way of preliminary objections on procedural grounds to the same proceeding. As each application or point of objection fails, an appeal is at once lodged, and the aid of this court is sought to stay all proceedings in the court below pending the hearing of the appeal against the spurious procedural objection. Let me say at once that such a practice constitutes an abuse of the court's process, leads to injustice and should not be countenanced by judges. A litigant who has a number of procedural and substantive grounds in opposition to any cause or matter, must take all of them in one go. He cannot present his case in instalments. He cannot take one procedural point at a time and invite a separate ruling from the presiding judge. This type of advocacy which has been on the rise over the past few years results in serious delays in the various stages of litigation. Judges at first instance and magistrates are therefore advised not to entertain these so called preliminary objections, save and except where they go to the jurisdiction of the particular court.

Take this very case. Each appeal before us is directed against each of the steps taken by the appellant to resist the winding up petition. Yet, all these objections could have been taken on a single application under two broad categories of procedural and substantive grounds of opposition to the respondent's petition. There would then have been just one judgment of the High Court dealing with all the points taken, and just the one appeal but mounted on several grounds. I must therefore say with much regret that the case for the appellant was handled most poorly in the court below.

The appeals proper

I propose to deal with these appeals on two broad grounds: those based on substance and those based on procedure.

THE SUBSTANTIVE GROUNDS

(i) The two petitions argument

The main ground of complaint is that there was, at the date on which the respondent presented its petition, already in existence another petition presented much earlier by another creditor. That creditor had been substituted by the Overseas Chinese Banking Corp Ltd ('OCBC'), and was represented before us by Mr Porres Royan, of counsel. The argument here is twofold. First, that a second petition is bad as a matter of law. Secondly, that the presentation of two petitions constitutes an abuse of process. Mr Cecil Abraham cited two cases in support of these arguments. The first of these is an unreported judgment of VC George J, given at first instance in *Re Kredin Sdn Bhd* (Companies Winding Up No 28–55–89), where the learned judge expressed the following view:

> In my judgment, when a petitioner is not entitled to present a petition or where the petition cannot be presented while an investigation as to the petitioner's entitlement to present the petition is pending, then in either case, r 33 may and should be invoked by any other person entitled to present the petition, and who is desirous of proceeding with it. The lesser would fall within the greater.
>
> The courts have always abhorred multiplicity of proceedings which rule applies to petitions. As has been seen, the whole point of the requirement that notice of the hearing of the petition be advertised is to give notice to the world of the fact of the petition, and of its date of hearing so that all interested parties could attend at the hearing and support or not support it, in any event be heard on it. One reason for this is to prevent multiplicity of petitions against the same company. Apart from the general inconvenience of having multiple petitions, there is the question of costs. Having separate petitions would be to subject the company to separate sets of costs, one in respect of each petition.

Mr Rasa Ratnam, for the respondent, has argued that r 33 of the Companies (Winding Up) Rules does not say that more than one petition may not be presented. He says that the rule is merely permissive. He also argues that VC George J did not hold the second petition to be bad in law. In any event, the reasons given by that learned judge for holding that the presentation of more than one petition is frowned upon for multiplicity are wrong. Counsel's final point is that VC George J misinterpreted the English cases. He relied on in support of his conclusion, in particular *Re Norton Iron Co* (1877) 47 LJ Ch 9. I find myself persuaded by these arguments. My reasons are reflected sufficiently from the judgment of the second authority cited to us by Mr Abraham. Contrary to his argument, it is a decision that clearly supports Mr Rasa Ratnam's submission. The case is *Ladli Parshad Jaiswal v Karnal Distillery Co Ltd* (1954) 24 Comp Cas 77, where at p 81, Dulat J, discussed the English cases on the point:

> Mr Khanna, appearing for the respondent, while admitting that two or more identical suits by the same person were maintainable even in the same court, contended that the case of winding up applications is peculiar, and that once a winding up application has been filed and it is a bona fide application, a second application of the same kind for the winding up of the same company does not lie. He was unable, however, to support this argument either on the

basis of any principle of law or any authority. Mr Khanna did refer to three English decisions, *Re Joint Stock Coal Co* [1869] LR 8 Eq 146, *Re Norton Iron Coy* (1877) 47 LJ Ch 9 and *Re Building Societies' Trust Ltd* (1890) 44 Ch D 140, but none of these afford any assistance to his argument. In these cases, the question mainly was of costs. In *Re Joint Stock Coal Co* there were two petitions for the winding up of the same company and both failed because neither disclosed any good ground for a winding up order. The learned vice chancellor disposes of the merits of the two petitions at p 153 of the report, and then after considering another question proceeds to consider the matter of costs at p 154 and decides:

> 'As to the second petition, by the shareholders of Norwich, I am not sure if theirs had been the original petition for winding up that I should have dismissed it with costs, because they have a fair ground of complaint in the discontinuance of the Norwich depot. But when it is considered that Green's petition had already been presented, and that the Norwich shareholders well knew all that was being done, there was no excuse under the circumstances for presenting a second petition, and it must consequently be dismissed with costs.'

It will be noticed that the second petition was not dismissed because of the existence of the first petition. In the next case, *re Norton Iron Company*, the second petition was dismissed because the first was allowed, and a winding up order was made on that first petition. In the last case, *re Building Societies' Trust Limited*, again one of the petitions was allowed and the other thereupon dismissed. It is clear therefore that in none of these cases was a winding up petition dismissed merely because another winding up petition of the same kind was awaiting decision. This matter concerning the position of several petitions for the winding up of the same company was considered in *re European Banking Company, ex p Baylis* (1866) LR 2 Eq 521 and Sir RT Kindersley VC, observed:

> 'However desirable it is to avoid a number of petitions being presented for the winding up of a company, I am not aware of any rule having been established with a view to limit the number of them. But still, every one of these petitions ought to be looked at separately upon its own merits as if it were the only petition presented.'

It is not shown that this view has been departed from in the English courts. There is thus no authority for concluding that the appellant's petition for the winding up of this company is not maintainable because a previous petition by him of a similar kind is pending and has not yet been decided. On general grounds too there appear several considerations why the appellant should not be debarred from seeking his remedy in this court merely because another court of competent jurisdiction is yet considering a similar prayer by him. The company in question is admittedly an Indian company, and as from the date of the partition, the responsibility for deciding disputes, connected with its affairs, rests on this court. If therefore a party seeks relief from this court in connection with such a dispute, feeling that he can obtain effective relief from this court alone, such relief ought not to be refused on any but substantial grounds. The old maxim of law is that a judge must extend his jurisdiction, which of course does not mean that he should usurp jurisdiction where none exists, but does mean that he ought to amplify as far as possible the remedies he can grant.

There you have it. I require no clearer authority for the proposition that more than one winding up petition may be presented against a company. Of

course, the provisions of r 33 are available to a petitioning creditor. And if he does not take advantage of that rule to have himself substituted for a lethargic petitioner, he may find himself out of pocket for his costs. But on no account is his petition bad in law. Nor is it an abuse of the court's process.

Mr Abraham sought to feebly argue that the respondent's petition comes within s 224 of the Act. That section strikes down any attachment, sequestration, distress or execution against the assets of a company after the commencement of a winding up. And s 219(2) of the Act deems winding up to have commenced at the time of presentation of the petition for the winding up. Counsel seeks to rely on the judgment of Lord Denning MR in *Re Overseas Aviation Engineering (GB) Ltd* [1962] 3 All ER 12 where he said:

> 'Execution' means, quite simply, the process for enforcing or giving effect to the judgment of the court: and it is 'completed' when the judgment creditor gets the money or other thing awarded to him by the judgment.

But a petition for winding up is not execution, for a winding up petition is not based upon any judgment of a court. Normally, it is based on the inability of a company to pay its debts as and when they fall due. Such inability is normally evidenced by the company's inability to satisfy or compound a notice of demand issued pursuant to s 218 of the Act. But the issuance of such a notice is not a sine qua non for the presentation of a winding up petition. What is needed is compelling evidence of the company's inability to pay its debts as and when they fall due. There are two cases that support this view.

In *Teck Yow Bros Hand-Bag Trading Co v Maharani Supermarket Sdn Bhd* [1989] 1 MLJ 101, Abu Mansor J (as he then was) said (at p 103):

> After hearing arguments I came to the conclusion on the facts before me the sole issue is whether Maharani is unable to pay its debt and therefore should be wound up. On such examination of the facts the evidence is overwhelming that the respondent Maharani is unable to pay its debt. I find as a fact that the petitioner has proved to my satisfaction that Maharani was unable to pay its debt and in so determining I am allowed to do so by taking into account the contingent and prospective liabilities of the company Maharani. As has rightly been pointed to by the petitioner's counsel as per encl 63, Maharani's debt according to the list of supporting creditors amounts to $100,000. To this must be added the amount he owed the opposing creditor, his landlord, $40,000. The distress realised only $61,000. Because of this amount it has never been really disputed by the opposing creditor that Maharani is insolvent but what the objection consists of is that there was sufficient to pay Ban Heng Hong and by that yardstick Maharani is able to pay its debt and we shut our eyes to the other creditors in the list. To take that view is in my view unreasonable and unjust.
>
> As for the contention that no proper notice under s 218(2)(a) of the Act has been given I find in this case that the notice is in the circumstances unnecessary and I order that it be dispensed with as the petition is not wholly founded under s 218(2)(a) of the Companies Act. I am of the view that s 218(2)(a), (b) and (c) are mutually exclusive and on the facts and in the exercise of its discretion a company can be wound up by the court on any of the grounds (a), (b) or (c).

In *Taylors Industrial Flooring Ltd v M&H Plant Hire (Manchester) Ltd* [1990] BCLC 216, a winding up petition was presented and prosecuted despite the absence of a notice under the English equipollent to s 218 of the Act. The following passage in the judgment of Dillon LJ at p 219 of the report is especially instructive:

> There is no requirement that a creditor must serve a statutory demand. The practice for a long time has been that the vast majority of creditors who seek to petition for the winding up of companies do not serve statutory demands. The practical reason for that is that if a statutory demand is served, three weeks have to pass until a winding up petition can be presented. If, after the petition has been presented, a winding up order is made, the winding up is only treated as commencing at the date of the presentation of the petition; thus, if the creditor takes the course of serving a statutory demand, it would be giving the company an extra three weeks' grace in which such assets as the company may have may be dissipated in attempting to keep an insolvent business afloat, or may be absorbed into the security of a debenture holder bank. So, there are practical reasons for not allowing extra time, particularly where commercial conditions and competition require promptness in the payment of companies' debts, so that the creditor companies can manage their own cash flow and keep their own costs down.

There is, therefore, no merit at all in the weak suggestion of Mr Abraham that the presentation of the second petition by the respondent offends s 224 of the Act.

This head of argument therefore fails.

(ii) The stay and striking out arguments

The other substantive ground relied upon by Mr Abraham is that the petition ought to have been struck out or stayed by reason of two suits filed by the appellant impeaching the judgment on which the petition is based and the order for sale made against the appellant. The principles upon which a court acts in such a case are not in doubt. They are set out in two cases of primary importance.

In *Stonegate Securities Ltd v Gregory* [1980] 1 All ER 241, Buckley LJ said (at p 243):

> Where a creditor petitions for the winding up of a company, the proceedings will take one of two courses, depending on whether the petitioner is a creditor whose debt is presently due, or one whose debt is contingent or prospective by reason of the proviso in s 224(1), proviso (c). If the creditor petitions in respect of a debt which he claims to be presently due, and that claim is undisputed, the petition proceeds to hearing and adjudication in the normal way. But if the company in good faith and on substantial grounds disputes any liability in respect of the alleged debt, the petition will be dismissed or, if the matter is brought before a court before the petition is issued, its presentation will in normal circumstances be restrained. That is because a winding-up petition is not a legitimate means of seeking to enforce payment of a debt which is bona fide disputed. (Emphasis added.)

The other case is *Morgan Guaranty Trust Co of New York v Lian Seng Properties Sdn Bhd* [1991] 1 MLJ 95, where at p 97 Hashim Yeop A Sani CJ (Malaya) said:

There are many tests to be applied to see whether a petitioner for a winding-up order has locus standi. Insolvency is always a ground relied on in a petition. Prima facie an unpaid creditor is entitled to petition for a winding-up order against a company which fails to pay its debt. Macpherson says that the only test which seems capable of resolving all difficulties is that suggested by Crossman J in *Re North Bucks Furniture Depositories Ltd* [1939] 2 All ER 549, namely, that the term 'creditor' 'includes every person who has the right to prove in winding-up.

Looking at the grounds given in the petition in the instant case it is clear to us that the petition should not have been struck out *in limine* and should have been heard on its merits. This was the approach of this court in *Chip Yew Brick Works Sdn Bhd v Chang Hee Enterprise Sdn Bhd* [1988] 2 MLJ 447.

The appellant should not be prevented from pursuing its petition so that the court would be able to consider all evidence and determine whether it should exercise its discretion to order winding-up or not.

Relevant to this appeal is that part of the judgment in *Chip Yew Brick Works Sdn Bhd* [1988] 2 MLJ 447 which appears at pp 448 and 449:

> 'Even where the whole amount of debt claimed is disputed, the court can allow evidence to be adduced to enable it to consider whether or not there was a bona fide dispute and the court is competent to go into the evidence to consider that question for the purpose ultimately of determining whether it should exercise the discretion: *Re Welsh Brick Industries Ltd* [1946] 2 All ER 197.'

In the present instance, the judgment sought to be impeached was obtained on a hotly contested summons for judgment. It was unsuccessfully appealed to the Supreme Court. Despite all this, the first suit was filed in 1992 and the second in 1997. The application to stay the petition was taken out in April 2000, after the High Court had fixed the petition for hearing in the presence of all counsel. In these circumstances, can anyone blame Mr Rasa Ratnam when he questions the bona fides of the appellant? I think not. It follows from what I have said thus far, that there is in this case, no bona fide dispute based on substantial grounds.

As submitted by counsel for the respondent, this appellant has a history of questioning judgments after they are entered on summonses that are seriously contested. If what the appellant is seeking to do here is not an abuse, I cannot see what is.

Mr Abraham retorts that the suits had been fixed for hearing by Saari J, and that they did not go on only because that learned judge was elevated to this court. But what counsel overlooks is the fact that there was an application by the respondent pending in each of these suits to strike them out. With respect, having regard to the history of this matter, greater justice would have been done if these applications had been fixed for hearing and disposed of. I am confident that if the learned judge had properly addressed his mind to the facts and background to the two suits, he would have entertained serious doubts as to their bona fides. And it was incumbent for him to have regard to the history of the dispute to see if there was anything to try at all. The decision of the Supreme Court in *Raja Zainal Abidin bin Raja Haji Tachik & Ors v British-American Life & General Insurance Bhd* [1993] 3 MLJ 16 exemplifies the role of a court in a case such as the present.

A THE PROCEDURAL OBJECTIONS

(i) Affidavit preceding petition

This objection is particularly curious. The affidavit of truth shows that it was sworn an hour or so before the petition. Mr Abraham says that this is bad because the rules require the affidavit of truth to be sworn after the date B of the petition. He argues that there was no petition in existence when the affidavit was sworn. So, the entire proceedings are bad. There are dicta in some cases which support the view canvassed by Mr Abraham, but these are cases decided before the landmark judgment of Lord Woolf MR in *Nicholls v Nicholls* (1997) 147 NLJ 61, which was applied by Mohammed Azmi FCJ in *Lai Yoke Ngan & Anor v Chin Teck Kwee & Anor* [1997] 2 MLJ 565. I C quote from the latter case (at p 574):

> Although under O 2 r 1(1) of the Rules of the High Court 1980, non-compliance with the rules of procedure is to be regarded as mere irregularity and not a nullity, the court, like any other discretionary powers, must exercise its discretion to cure such procedural irregularity on correct principle. The D proper approach that should be adopted on curability should be on the basis of the principle laid down recently by Lord Woolf MR in *Nicholls v Nicholls* [1997] *The Times*, 21 January; 147 NLJ 61 on the exercise of the discretion conferred by the English RSC O 59 r 10(3) and s 13(3) of the Administration of Justice Act 1960:
>
> > 'I have cited extensively from the previous authorities to indicate that they E show no common pattern of approach. The later cases do however make it clear that it is now recognised that O 59 r 10(3) and s 13(3) of the 1960 Act do give a court the power to rectify procedural defects both in the procedure leading up to the making of the committal order and after a committal order has been made. *Like any other discretion, the discretion provided by the statutory provisions, must be exercised in a way which in all the circumstances best reflects the requirements of justice.* In determining this, the F court must not only take into account the interests of the contemnor but also the interests of the other parties and the interests of upholding the reputation of civil justice in general. Today, it is no longer appropriate to regard an order for committal as being no more than a form of execution available to another party against an alleged contemnor.
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> > The court itself has a very substantial interest in seeing that its orders G are upheld. If committal orders are to be set aside on purely technical ground which have nothing to do with the justice of the case, then this has the effect of undermining the system of justice and the credibility of the court orders. While the procedural requirements in relation to applications to commit and committal orders are there to be obeyed and to protect the contemnor, if there is non-compliance with the H requirements which does not prejudice the contemnor, to set aside the order purely on the grounds of technicality is contrary to the interests of justice. As long as the order made by the judge was a valid order, the approach of this court will be to uphold the order in the absence of any prejudice or injustice to the contemnor as a consequence of doing so.
> >
> > In the future therefore it should not be necessary to revisit the I authorities prior to the decision in *M v P Butler and Butler*. It should be recognised that O 59 r 10 and s 13(3) of the 1960 Act give the court a discretion which they are required to exercise. To decline to exercise that

discretion because of a technical error in the notice of application to commit or the committal order itself, in the absence of any prejudice, is to derogate from that discretion.'

On the basis of the above principle, the discretion available to this court to cure irregularities under O 2 r 1(1) of the RHC read together with s 69(4) of the Courts of Judicature Act 1964 [the equivalent of the English O 59 r 10(3)] and as well as s 101 of the same Act which allows this court to discount 'any error, defect or irregularity whether in the decision or otherwise, not affecting the merits or the jurisdiction of the court', should only be undertaken by the court in the absence of prejudice. Thus defects affecting merits or the jurisdiction of the court ought not to be cured, in the exercise of the discretionary power. (Emphasis added.)

Now, the observations of the Master of the Rolls in *Nicholls v Nicholls* were made in the context of a case of contempt of court, where the liberty of the subject is at stake. If in those circumstances, procedural irregularities are to be overlooked in the interests of justice, then a fortiori in cases as the present where there is no question of such a serious consequence. In my judgment, the fact that the affidavit predated the petition by hours, or even days, does no injustice to anyone. There is, accordingly, nothing in this point.

(ii) Amendment of petition

There are really two points here. First, that the amendment ought not to have been granted. There is a short answer to this argument. The power to amend is discretionary. It is to be exercised liberally in the interests of justice so that the real issues may be placed before the court. An appellate court does not interfere in such cases unless there is a misdirection. Having reviewed the material, I am satisfied that any reasonable tribunal similarly circumstanced would have come to the same conclusion and granted the amendment.

The second point here is that the amended petition was not annexed to the affidavit of truth. Mr Rasa Ratnam says that that is not quite correct. In my view, even if there had been an omission (which there is none here) it is not fatal. The interests of justice are not thwarted by such procedural departures.

It follows that this ground fails.

(iii) The refusal to permit cross examination

There is a complaint that the judge declined to permit cross examination. This ties in with the summons to stay the petition on the ground that there are those two suits which I mentioned earlier in this judgment. Again, this turns on the question of bona fides. The subject matter on which the cross examination was to be directed had to do with the correctness of the summary judgment entered against the appellant and tested at the appellate level. The application to cross examine was therefore clearly an abuse of the court's process. What was being proposed was a reopening of a cause that had been disposed of to finality. Such a step is usually classified by the courts as an abuse of its process, see *Hunter v Chief Constable of West Midlands & Anor* [1981] 3 All ER 727.

The decision whether or not to order cross examination was within the discretion of the primary judge. He exercised it in a particular way. On the available material, any reasonable tribunal, similarly circumstanced, would have arrived at the same decision.

There is therefore no merit in this head of argument.

Conclusion

After careful consideration of the arguments addressed to us, I came to the conclusion that all these appeals are without merit and should fail. My learned brothers agreed with my views. Accordingly, at the conclusion of arguments, all the appeals were dismissed and those orders made that are usually consequent upon a dismissal.

Postscript

After we had dismissed all these appeals, Mr Abraham applied for a stay of execution pending an application for leave to the Federal Court. That was refused as well.

Abdul Hamid Mohamad JCA: . I have had the advantage of reading the judgment of my learned brother Gopal Sri Ram JCA, and I agree entirely with his views. However, I only wish to add a few words to further emphasize my unhappiness (and his too) about the way winding up petitions are often conducted. Indeed, what I am saying here is no more than what I have earlier said on at least four occasions when I was sitting in the High Court. Reference can be made to *Buildcon-Cimaco Concrete Sdn Bhd v Filotek Trading Sdn Bhd* [1999] 4 CLJ 135; *Antara Elektrik Sdn Bhd v Bell & Order Bhd* [2000] 6 MLJ 385; *Sun Microsystems (M) Sdn Bhd v KS Eminent Systems Sdn Bhd* [2000] 4 MLJ 565 and recently *SP Setia Bhd v Gasing Heights Sdn Bhd* [2001] 5 MLJ 117.

As pointed out by my learned brother Gopal Sri Ram JCA, the unhealthy trend is, upon being served with a petition, instead of defending the petition proper at the hearing of the petition, the respondent makes all kinds of interlocutory applications that would invariably stall the hearing of the petition proper. If the application is dismissed, the respondent would appeal to the Court of Appeal, or may even try to go further, further delaying the hearing of the petition. I have come across cases where even an order made by the senior assistant registrar under r 32 of the Companies (Winding-up) Rules 1972 ('the Rules') was appealed against, and when the appeal was dismissed, the respondent further appealed to the Supreme Court — see *Asia Commercial Finance (M) Bhd v Lum Choon Realty Sdn Bhd* Penang High Court Winding Up No 28–60–92. Of course, having filed the notice of appeal, the respondent then filed a notice of motion to stay all proceedings pending the disposal of the appeal by the then Supreme Court. When the notice of motion was dismissed, another appeal was filed. The effect is that the hearing and disposal of the petition is delayed.

One of the most abused procedures adopted in winding up proceedings is the application to strike out the petition under O 18 r 19 of the Rules of

the High Court 1980 ('the RHC') and/or the inherent jurisdiction of the court.

In *Buildcon-Cimaco Concrete Sdn Bhd*, I pointed out the undesirability of applying such procedure to a winding up petition:

> Besides, the Companies (Winding-up) Rules 1972 provides its own scheme of procedure for a s 218 winding up petition which is more simplified and geared for speedy disposal. The Rules of the High Court 1980, for example, provides for appearance (conditional and unconditional), discoveries, interrogatories, judgment in default of pleading, summary judgment (O 14), striking out of pleadings (O 18 r 19), summons for directions and setting down for trial. Hearing date is only given after the directions made in the summons for directions are complied with, and the case has been set down for trial. Perhaps because of these requirements which take some time to be complied since the filing of a writ, that procedures for judgment in default of pleading, summary judgment and the striking out of the writs and pleadings are provided, for quick disposal in clear cut cases.
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> The scheme under the Companies (Winding-up) Rules 1972 is different. When the petition is issued out of court, a hearing date is given straight away. Whatever has to be done, eg service, advertisement, compliance with r 32, will have to be done before the hearing date. The court is supposed to hear the petition straight away on the date fixed for hearing, the very first time it comes up before it. If everything is done as scheduled, the petition is heard on the date first fixed for hearing. That is what the Rules envisage. In the circumstances, there is no necessity for provisions for judgment in default, summary judgment or striking out the pleading or trial on issues. I am of the view that that is the reason why the Companies (Winding-up) Rules 1972 do not provide for such procedures. They are not necessary.
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> Furthermore, more often than not, resort to O 18 r 19 of RHC 1980 in winding up proceedings results in the delay in the hearing of the petition. The application is usually filed one or two weeks before the date fixed for the hearing of the petition. Application is made for it to be heard first, supposedly, to save the court's time.
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> In reality, it delays the hearing of the petition. Whenever there is such an application, inevitably, the hearing of the petition is delayed. Not only will the petition be adjourned for the application to be heard first, but if dismissed, there will be an appeal to the higher court(s).

These views were reiterated in *Antara Elektrik Sdn Bhd v Bell & Order Bhd*, this time in Bahasa Malaysia.

In *Sun Microsystems (M) Sdn Bhd*, I stressed the difference between the procedure in respect of a writ action under the RHC and a winding up petition under the Rules:

> It is important to note that the procedure in a winding up proceeding, as provided by the Companies (Winding-Up) Rules 1972, is different from the procedure in a writ action as provided by the Rules of the High Court 1980 ('the RHC'). In a winding up proceeding, the procedure is simple and brief. That is what it is meant to be. When a petition is filed, the senior assistant registrar gives a hearing date straightaway before the petition is issued. The petitioner is expected to do everything he or it has to do in terms of complying with the procedural requirements eg, serving, gazetting and advertising,

before the hearing date. The petition is to be heard on the date fixed for hearing.

On the other hand, in a writ action, upon filing, no date (be it for hearing or for mention) is given by the senior assistant registrar. He merely signs the writ and issues it. The writ itself clearly says:

> 'We command you that within eight days after the service of this writ on you, inclusive of the day of such service, *you do cause an appearance to be entered for you* at the suit of … And take notice, that in default of you so doing the plaintiff may proceed therein to judgment and execution.' (Emphasis added.)

The trial date is a long way off. Indeed, there may not be any at all.

It is important that the procedure applicable in a writ action should not be incorporated into a winding up proceeding. It is not meant to be. Appearance is required (and provided for) in a writ action, so that the plaintiff will know whether to take a judgment in default or not. If an appearance is filed, followed by defence, then at the close of the pleadings, the plaintiff should apply for directions and ask for the case to be set down for trial. In other words, he asks for a trial date. That is not necessary in a winding up petition because the hearing date has been given even before the petition is issued. That is why there is no provision for appearance, defence, summons for directions, setting down for trial etc in a winding up proceeding.

Finally, the same view was reiterated in *SP Setia Bhd.*

Having written on it four times and in two languages, it is timely that my learned brother Gopal Sri Ram JCA and this court come out strongly against such practices, which, at the very least is delaying the hearing and disposal of winding up petitions, which is unfair to the petitioners and clogging the court docket.

Appeal dismissed.

Reported by Jafisah Jaafar

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